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Fourth report on unilateral acts of States

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Introduction*

1. The International Law Commission considered the topic of unilateral acts of States at its 2624th, 2628th to 2630th and 2633rd meetings during its fifty-second session held from 19 May to 7 June 2000.

2. At this time, the Commission had before it the third report of the Special Rapporteur (A/CN.4/505) in which he introduced draft articles and commentaries thereto on various aspects of the topic, concerned mainly with the elaboration or formulation of unilateral acts, aspects on which it has been felt that common rules may be drawn up for all such acts, regardless of their material content.

3. After considering that report, the Commission decided to refer to the Drafting Committee articles 1 to 4 concerning the definition of unilateral acts (art. 1); the capacity of States to formulate unilateral acts (art. 2); persons authorized to formulate unilateral acts on behalf of the State (art. 3) and subsequent confirmation of an act formulated by a person not authorized for that purpose (art. 4). The Drafting Committee, however, was not able to start its consideration of this topic.

4. The Commission also decided to refer to a Working Group, which was established during that session, article 5, concerning the causes of invalidity, a delicate matter which, in the view of some members of the Commission, warranted more extensive study, along with the consideration of the question of the conditions of validity of a unilateral act.

5. It should be recalled, in this respect, that some members of the Working Group stressed the relationship of this article with "a necessary provision on the conditions of validity of the unilateral act" and added that "a study on the conditions determining the validity of unilateral acts ... would call for an examination of the possible material content of the act, its lawfulness in terms of international law, the absence of flaws in the manifestation of will, the requirement that the expression of will be known, and the production of effects at the international level. Once those conditions had been identified and decided in detail, it would be easier to lay down appropriate rules governing invalidity".[1]

6. Moreover, one member of the Commission drew attention to the link with a possible provision on revocation, since "if unilateral acts could be revoked, it was in the interests of the State to use that method rather than invoke a cause of invalidity. The causes of invalidity should therefore essentially concern unilateral acts that were not revocable".[2]

7. At that session, the Commission established a Working Group, which held two preliminary meetings during the first part of the session and considered some aspects of the topic, as is reflected in the report which the Commission submitted to the General Assembly at its fifty-fifth session; however, the Working Group was unable to take up the topic relating to invalidity of unilateral acts as had been envisaged.[3]

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* The Special Rapporteur wishes to thank Mr. Nicolás Guerrero Peniche, doctoral candidate at the Graduate Institute of International Studies in Geneva, for the assistance provided in the research work relating to the fourth report.

[1] ILC(LII)/WG/UA/WP.1.

[2] Mr. Economides, A/CN.4/SR.2630.

[3] *Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), paras. 620-622.

8. In the Sixth Committee of the General Assembly, various representatives made general comments on the topic, stressing, in particular, that its codification and progressive development might promote the stability of international relations.[4] It was also stressed that although "State practice and jurisprudence were very poorly developed ... the topic was extremely important and the Commission must pay particular heed to it".[5] Similarly, it was observed that "despite the diversity and complexity of the topic", the matter was "an eminently fit subject for study".[6] Other representatives, however, expressed doubts on the topic.[7] Nevertheless, in the opinion of the Special Rapporteur, as Fiedler points out:

> "unilateral acts give rise to the possibility of developing international law, particularly regional international law, or of preventing or limiting the formation of new customary international law (protest). Through a corresponding State practice it is also possible for unilateral acts to change the interpretation of existing international treaties and in this way to influence and supplement international law. For these reasons unilateral acts have a considerable impact on the formation of new law."[8]

9. In this fourth report the Special Rapporteur, taking into account the comments made by members of the Commission and by the representatives of States in the Sixth Committee of the General Assembly, proposes to take up various issues, some of a general nature which follow on from the first report submitted on the topic, which, as will be recalled, offered an introduction and a delimitation of the topic; and others which constitute a continuation of the third report, which introduced various draft articles and commentaries thereto on issues in respect of which, in the view of the Special Rapporteur, common rules may be formulated.

10. With regard to the general aspects of the topic, first, an issue will be taken up which is considered fundamental to the study and development of the topic: the classification of unilateral acts, an exercise which must precede the formulation of common rules for the various categories of unilateral acts, in view of the diversity of such acts; to this end, some of the doctrine, and the comments of the members of the Commission and some Governments, particularly in their replies to the questionnaire which the Commission drew up in 1999, had been taken into account.

11. The Special Rapporteur believes that, it is essential to group material unilateral acts in categories to which common rules may be applied. There is no doubt, and it has been apparent, that from the material point of view, unilateral acts are diverse, particularly as regards their legal effects. Although excellent works may be found in the doctrine which facilitate the study of material unilateral acts, it is clear that not all authors consider them from the same point of view, or reach the same conclusions, and this does not facilitate the study undertaken by the Commission.

12. In considering the various material unilateral acts, it may be noted that there are similarities, particularly in respect of their formulation. On the other hand, it may also be noted that there are significant differences, particularly in respect of their legal effects.

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[4] The Netherlands (A/C.6/55/SR.22).
[5] Libyan Arab Jamahiriya (ibid.).
[6] Cuba (A/C.6/55/SR.24) and India (A/C.6/55/SR.19).
[7] Japan (A/C.6/55/SR.23), United Kingdom (A/C.6/55/SR.19) and Germany (ibid.).
[8] Wilfried Fiedler, "Unilateral Acts in International Law", in Rudolf Bernhard (ed.), *Encyclopedia of Public International Law* 7 (1984), p. 522.

13. Furthermore, a unilateral act of a State, in the sense with which this study is concerned, may be defined in various ways, as we will see later, and this further complicates the consideration of the topic and any work of codification and progressive development.

14. In chapter I of this report, the Special Rapporteur will attempt to establish an appropriate classification of unilateral acts in order to form the basis for grouping the rules applicable to the various categories. This exercise has to be preceded by the determination of valid criteria on which this classification would be based, and for this purpose, some consideration will have to be given to material unilateral acts in terms of both their content and their legal effects.

15. In chapter II, specific consideration will be given to an important aspect of legal acts in general: the interpretation of unilateral acts, an issue which needs to be analysed in depth in order to determine whether the rules of the 1969 Vienna Convention are applicable mutatis mutandis to unilateral acts or whether they can serve only as an inspiration and a reference point for drawing up rules applicable to these acts; and, if this is the case, to what extent the Vienna rules may be taken into account, bearing in mind that unilateral acts differ in some respects from the conventional acts which are the subject of that Convention, mainly in respect of their formulation, their coming into being and the production of legal effects.

16. Furthermore, it must be determined whether the rules relating to interpretation are normally applicable to all unilateral acts regardless of their content and their legal effects or whether, instead, such rules should be drawn up on the basis of each category of these acts.

17. The Special Rapporteur will offer some draft articles concerning the interpretation of unilateral acts.

18. He will then take up the topic of the coming into being of the legal act, the production of legal effects, their materialization, and the enforceablity and opposability of the act, on which some draft articles will also be offered for the Commission's consideration.

19. Lastly, the Special Rapporteur will take up in a very preliminary way a study of the causes of invalidity, an issue which was considered by the Commission and on which the Working Group referred to above was requested to carry out more detailed study and submit a new draft article.[9] Some members, as noted above, felt that the consideration of this topic should be preceded by a study of the conditions of validity of such acts.

20. Although the topic of invalidity is to be taken up by the Working Group to be established this year in the Commission to consider this issue specifically, the Special Rapporteur felt that in this introductory part it would be worth making some reference to the regime of invalidity in international law and its application in the context of unilateral acts and also to the possibility of drawing up specific rules

[9] At its 2633rd meeting, on 7 June 2000, the Commission decided that the Working Group on Unilateral Acts would continue the study of draft article 5 submitted by the Special Rapporteur.

concerning the conditions of validity, which in his view may facilitate the work and deliberations of the Working Group.[10]

21. After that, consideration will be given to some acts and conduct of the State which, while they may be unilateral in a formal sense, merit closer study in order to determine whether or not they fall within the context of the unilateral acts with which we are concerned.

22. At the most recent session of the Commission some members[11] stressed the importance of silence and the need for further study of that issue and its relationship to the unilateral acts with which the Commission is now concerned; this matter is of interest, so that a further brief reference is justified at this stage of the study of the topic.

23. Silence has very special relevance in the context of treaty law, not only because of the effects it may produce in this sphere or in the context of these relations, but also in relation to some particular issues, for example in relation to reservations, as observed in article 20, paragraph 5, of the 1969 Vienna Convention on the Law of Treaties which includes, in principle, the criterion of acceptance of a reservation in the absence of any objection within a fixed time limit.

24. Silence also has a close relationship with unilateral acts, as in the case of recognition and protest, but it should be distinguished from the legal act as such, in the strict sense which is of interest to the Commission.

25. Unquestionably, silence is a mode of expression of the will of a State which may produce significant legal effects[12] even though its meaning may be undetermined.[13] It has been expressly and carefully considered in the doctrine and has been examined in case law, particularly by the International Court of Justice, in cases such as those concerning the Norwegian *Fisheries, Right of Passage over Indian Territory, Temple of Preah Vihear, Military and Paramilitary Activities* and the land, island and maritime frontier dispute, among others.[14]

26. As noted previously, silence cannot be considered an autonomous manifestation of will, since it is a reaction. Silence or inaction must be perceived in relation to a pre-existing or contemporaneous attitude on the part of another

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[10] Some members, speaking generally on article 5, "stressed its relationship with a necessary provision on the conditions of validity of the unilateral act, which had not yet been formulated. A study on the conditions determining the validity of unilateral acts, it was said, would call for an examination of the possible material content of the act, its lawfulness in terms of international law, the absence of flaws in the manifestation of will, the requirement that the expression of will should be known and the production of effects at the international level. Once those conditions had been identified and decided in detail, it would be easier to lay down appropriate rules governing invalidity." (*Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10* (A/55/10), para. 586).

[11] Ibid., paras. 584-585.

[12] Alejandro Rodríguez Carrión, *Lecciones de Derecho International Público* (Madrid, Tecnos, 1990), p. 173.

[13] Statement by the representative of Spain at the Vienna Conference, quoted in Marcelo Kohen, *Possession contestée et souveraineté* (Paris, Presses Universitaires de France, 1997), p.293.

[14] Noteworthy among the cases considered by the International Court of Justice are *Fisheries (United Kingdom v. Norway), I.C.J. Reports 1951*, p. 138, and *Temple of Preah Vihear, I.C.J. Reports 1962*.

subject.[15] Furthermore, silence is not the mere fact of not expressing oneself, but rather the absence of a reaction to the conduct or position of the other party.[16]

27. A legal act is a manifestation of will, and, although silence also is undoubtedly a form of manifestation of will linked to prior knowledge,[17] it is not a legal act in the sense being dealt with here. In some legal systems, silence is not considered a legal act, though it is considered a manifestation of will.[18]

28. Silence and acquiescence are closely related. Acquiescence, as MacGibbon says, "takes the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection".[19] It is interesting to note, with respect to the legal effects of silence, that if, by protest, a State attempts to block the claims of another State, silence may give rise to an obligation to desist from claiming a right or from contesting the legality of an existing situation, especially if a pre-existing rule attaches such a meaning to silence.

29. Acquiescence may be manifested actively, tacitly or both actively and tacitly. In the case concerning the arbitral award made by the King of Spain in 1960, the International Court of Justice concluded that Nicaragua had no grounds for asserting the nullity of the award, not only because of its positive acts of acquiescence, but also because it had taken no objection before the King of Spain to his proceeding with the arbitration.[20] The conduct of the State was also considered in the *Temple of Preah Vihear* case, in which the Court considered the conduct of the Siamese authorities and concluded that their failure to react constituted acquiescence.[21] In the *Minquiers and Ecrehos* case, the Court recognized the United Kingdom's sovereignty over the Minquiers, not only on the basis of acts which indicated a

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[15] Kohen, op. cit., p. 293.

[16] Idem.

[17] The case law of I.C.J. appears to consider silence on the basis of the voluntaristic approach; that is, considering the precondition of knowledge, as in the Norwegian *Fisheries* case. *I.C.J. Reports 1951*, pp. 138-139; see Johnson, "Acquisitive prescription in international law", *The British Yearbook of International Law*, 1950, p. 347.

[18] For example, the legal formula *qui tacet consentire videtur* in canon law is not reflected in French law, in which "silence says nothing, precisely because it is silence ... it is the absence of any declaration, even a rudimentary one; it renders impenetrable the will of the silent party and even raises doubts as to whether the latter harbours the will to take a decision". Quoted from Jacques Bentz, "Le silence comme manifestation de volonté", *Revue générale de droit international public*, 1963, p. 46. It should also be noted that the formula "he who says nothing consents" is not a legal principle applicable in all circumstances in which a subject refrains from reacting to the conduct of another. Moreover, it is not a complete translation of the adage "qui tacet consentire videteur si loqui debuisset ac potuisset", referred to by I.C.J. in the *Temple of Preah Vihear* case (*I.C.J. Reports 1962*, p. 23), quoted by Kohen, op. cit., p. 293.

[19] MacGibbon, "The Scope of Acquiescence in International Law", *The British Yearbook of International Law*, 1954, p. 143.

[20] *I.C.J. Reports 1960*, p. 209.

[21] In addition, the Court considered various positive acts in forming its opinion on acquiescence. *I.C.J. Reports 1962*, pp. 25 and 27. See also the cases of *Lubeck v. Mecklenburg-Schwerin, Annual Digest of Public International Law Cases*, 1925-1926; the border between Venezuela and Colombia, in *Reports of International Arbitral Awards*, vol. I, p. 280; *Island of Palmas*, ibid., vol. II, p. 868; *Air Service Agreement between the United States of America and France*, ibid., vol. XVIII; *Fisheries, I.C.J. Reports 1951*, p. 139; *Minquiers and Ecrehos, I.C.J. Reports 1953*, pp. 47 ff.; *Right of Passage over Indian Territory (Portugal v. India), I.C.J. Reports 1960; Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1984*, pp. 408-410.

certain recognition of that sovereignty on the part of France, but also because France had not formulated reservations to a diplomatic note that included those islands.[22] Lastly, there is the *Island of Palmas* case, in which the absence of protest, according to the sole arbitrator Max Huber, was tantamount to acquiescence,[23] as in the *Fisheries*[24] case.

30. Silence can be a means of accepting or recognizing a legal claim or an existing situation, but this form of inaction or reaction can hardly be a means of effecting a promise. Lack of protest — that is, silence — can be decisive in legitimizing a given situation or legal claim, although it is clear that silence in itself does not signify any recognition whatsoever; the formulation of a protest is necessary only when, depending on the situation in question, a State may be expected to take a position.[25]

31. In conclusion, silence has an unquestionable legal relevance, as a form of conduct, in relations between subjects of international law, but this does not mean that it can be defined as a legal act in the sense being dealt with by the Commission; that is, as an express manifestation of independent will intended to produce legal effects in relation to third States which did not participate in its elaboration.

32. It has also been noted that continued consideration should be given to estoppel, which has already been commented upon in previous reports, and its relation to the study of unilateral acts. Comments on this relation will be made as appropriate because, while it is true that these are different matters, the acts which give rise to estoppel are unilateral in form and may sometimes be confused with the unilateral acts referred to in the study undertaken by the Commission, especially in view of the fact that the author State could be obligated, by such an act, to adopt a given conduct.

33. Lastly, it seems appropriate, in this introduction, to refer briefly to interpretative declarations and to unilateral acts related to international responsibility, particularly unilateral acts related to the adoption of countermeasures by an injured State or States, in accordance with the draft articles currently being finalized by the Commission.

34. From a formal standpoint, interpretative declarations are unquestionably unilateral acts, whereby the author State or States purport to specify or clarify the meaning or scope which they attribute to a treaty or to certain of its provisions, as reflected in draft guideline 1.2 considered by the Commission in 2000. Unilateral interpretative declarations are generally made within the framework of treaty relations. An interpretative declaration "operates within a legal mechanism which is dominated by a structure of relations based on consensus. It is precisely because of all this that an interpretative declaration which is accepted can give rise to an actual legal agreement between the contracting party making the declaration and the contracting party accepting it."[26]

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[22] *I.C.J. Reports 1953*, p. 71.

[23] *Reports of International Arbitral Awards*, vol. II, p. 868.

[24] *I.C.J. Reports 1951*, p. 139.

[25] Reference to the arbitral award by Max Huber of 4 April 1928 in the *Island of Palmas* case. *American Journal of International Law*, vol. 22 (1928), p. 880. Quoted in Alfred Verdross, *Derecho international público* (Madrid, Aguilar, 1967), p. 103.

[26] Rosario Sapienza, "Les déclarations interprétatives unilatérales et l'interprétation des traités", *Revue générale de droit international public*, 1999, vol. 3, p. 621.

35. While interpretative declarations, in the broad sense, must be made in the framework of treaty relations, since they are linked to a pre-existing text or agreement, interpretative declarations whereby the author State, or States, undertake unilateral commitments "going beyond those imposed on it by the treaty" and which, according to the Commission's definition, are "outside the scope of the ... Guide to Practice" may be categorized as unilateral acts within the meaning being dealt with by the Commission. If an interpretative declaration formulated by a State with respect to a treaty or one of its provisions includes commitments that go beyond those provided for in the treaty, then that declaration reflects a material independence which excludes it from the treaty relation, despite the relationship it may have to the text of the treaty, which clearly establishes a bilateral relation with another State or other States. In particular, such declarations, in our view, would be subject to a legal regime other than that of the 1969 Vienna Convention; that is, to the particular regime concerning unilateral acts. These are, in sum, non-dependent unilateral acts which produce effects by themselves in relation to one or more States which did not take part in their formulation.

36. Also in the context of the international responsibility of States, it is possible to observe acts and conduct of States, which are unilateral in form, and these will be considered below with a view to determining their relationship to the unilateral acts of States being dealt with here; this issue was raised previously by the Special Rapporteur in his third report.

37. First, in this context, there are acts or conduct, which are not always active, whereby a State breaches an international obligation to another State or to the international community as a whole. Such acts, action or inaction are clearly unilateral acts from a formal standpoint, but are not necessarily legal acts according to the definition of such acts *lato sensu*, which is based on the manifestation of will expressed with the intention of producing specific legal effects.

38. Limiting the scope of the definition of the unilateral acts being dealt with here is, in our view, essential. The unilateral acts being discussed by the Commission must be considered in a restrictive way. The draft should be limited in scope to acts expressly formulated with the specific intention of producing legal effects in a non-dependent manner on the international plane; this largely reflects the definition of classic material unilateral acts, although the diversity of such acts and the difficulty of characterizing them cannot be ignored. This limitation will undoubtedly facilitate the consideration of the topic and will avoid confusion among the regimes which could at some point be applied to these acts. The concept of a unilateral legal act must be limited to the definition of a legal act in the general sense, although it may be agreed that this is not the only conduct of a State which has legal consequences on the international plane. An offence, a quasi-contract or a simple act may also have such consequences. There is no doubt that "while such conduct leads only to the application of an existing norm, a legal act gives rise to a new norm".[27]

39. In the context of the international responsibility of States, it may be observed that countermeasures, which are in themselves wrongful acts, are permitted under international law as a means of responding to the breach of an international obligation and bringing about the cessation or reparation of the breach. As reflected in the draft articles on State responsibility which the Commission is considering at the current session, particularly draft articles 23 and 50 to 55, a State may take

[27] Jean-Paul Jacqué, *Éléments pour une théorie de l'acte juridique* (Paris, Librairie générale de droit et de jurisprudence (LGDJ), 1972), p. 8.

countermeasures against another State which is allegedly responsible for an internationally wrongful act "in order to induce that State to comply with its obligations". The overall logic of countermeasures, as noted by Combacau and Sur, "is part of the dialectic of unilateral acts and conduct".[28] Without attempting to provide a definitive answer, as the Commission is still considering the issue, it is interesting to try to determine whether such acts should be viewed in the context of treaty relations and should therefore be subject to the existing regime set forth in the Vienna Conventions, or whether they may be deemed to take place outside that context and may therefore be subject to the rules relating to unilateral acts in the strict sense.

40. A State may take various types of countermeasures: acts, actions and conduct constituting unilateral measures which are not necessarily legal measures.

41. A unilateral act in the form of a countermeasure may be a conventional act despite its unquestionably unilateral character, as in the case of the denunciation or suspension of a treaty by a State which considers that another State has breached its international commitments thereunder. Likewise, the allegedly injured State may adopt a regime or a domestic law applicable to its relations with the State which allegedly has failed to meet its obligations towards the first-mentioned State, as in the case, for example, of Nicaragua's adoption of domestic regulations, in particular Law No. 325 of 7 December 1999, imposing taxes on goods and services proceeding or originating from Honduras or Colombia.[29] This, in effect, is a domestic legal act, unilateral in form, which, by itself, has produced legal effects on the international plane, and whose duration will depend on the subsequent attitude of Honduras in relation to the above-mentioned treaty, signed on 2 August 1986 and in force since 1999. This act, while it is unilateral and autonomous in the sense that it produces effects by itself on the international plane, would not be categorized as a unilateral act in the strict sense because, in our view, it does not constitute the express manifestation of will that must characterize unilateral acts in the sense being dealt with here, as has been noted on several occasions.

42. By their very nature, unilateral acts whereby a State applies countermeasures against another State must be excluded from the scope of the study of unilateral acts. Such acts, which are unilateral from a formal standpoint and are sometimes legal acts — when they are not actions or other conduct — are necessarily linked to a pre-existing commitment; in other words, to the prior agreement which the latter State is

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[28] Combacau and Sur, *Droit international public* (Paris, Montchrestien, 1993), p. 213.

[29] In November 1999, Nicaragua requested the Central American Court of Justice to

> "(a) declare that the adoption and ratification of the maritime delimitation treaty by Honduras and the State of Colombia would breach the legal instruments governing regional integration; (b) determine the international responsibility of the Republic of Honduras and the reparation which it would have to make to the Republic of Nicaragua and the Central American institutional system; (c) immediately take provisional measures against the State of Honduras, urging it to refrain from adopting and/or ratifying the aforesaid maritime delimitation treaty ... until the sovereign interests of the State of Nicaragua in relation to its maritime areas, the patrimonial interests of Central America and the highest interests of Central America's regional institutions have been safeguarded".

The Court, for its part, found that Nicaragua's application was admissible and, to safeguard the rights of the parties, ordered as a provisional measure that "Honduras should suspend the ratification procedure and subsequent procedures for the entry into force of the maritime delimitation treaty signed ... on 2 August 1986".

alleged to have breached. It should be emphasized that this is "a rule which arises as a result of the violation of a primary rule: when a State breaches an international obligation, it must know that it thereby empowers another State to react by taking a measure which would, in other circumstances, be prohibited under international law, but of which the wrongfulness is precluded by the fact that the measure has been taken in response to an act which is itself contrary to international law".[30] In conclusion, such acts cannot be considered as independent and, therefore, they must be placed outside the context of treaty relations.[31]

43. While it may be considered that interpretative declarations which go beyond the terms of a treaty may be included among the unilateral acts being dealt with here, silence and unilateral acts involving countermeasures must be placed outside this context, firstly because they are reactions, which means that they do not have the necessary autonomy, and secondly because they are not acts expressly formulated with the intention of producing specific legal effects.

I. Classification of unilateral acts

44. Clearly, as has already been noted, it is possible to establish common rules for unilateral acts in the sense understood by the Commission, which is reflected in draft article 1. These common rules include those governing the formulation of such acts; formal aspects, such as their definition and the capacity of States and their representatives; and general conditions for validity and causes of invalidity, which are elements common to all legal acts, whatever their nature; in other words, both conventional and unilateral acts.

45. But it is also clear, and has been stressed in the Commission, that it is not always possible to establish common rules applicable to all unilateral acts if we conclude that there is, in fact, significant diversity among these acts. As is normally recognized in the doctrine,[32] while unilateral acts have or may have great similarities, particularly from the point of view of form, they also have significant differences in their content and legal effects, as may be deduced from a study of classic material unilateral acts such as promise, recognition and waiver.

46. In the Sixth Committee of the General Assembly, some members were in agreement that the draft articles should be organized around the distinction between general rules applicable to all unilateral acts and specific rules applicable to individual categories of such acts,[33] as had been suggested in the Commission by some members and by the Special Rapporteur himself.

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[30] Prosper Weil, "Cours général de droit international public", *Recueil des cours de l'Académie de droit international*, 1992, vol. 237-VI, pp. 358-359.

[31] It is important to stress, however, that responsibility entails new legal relations, as indicated in the draft commentary on international responsibility (ILC(LIII)/SR/CRD.1 of 26 April 2001, p. 1); this could make it appear that the acts in question are autonomous or independent acts.

[32] In this respect, professors Combacau and Sur (op. cit., note 28) point out that although they (unilateral acts) are not mentioned in article 38 of the Statute of the Court, they are as numerous as they are varied and their importance is considerable.

[33] See the statements made by Argentina (A/C.6/55/SR.20), Cuba (A/C.6/55/SR.24), Romania (A/C.6/55/SR.23) and France (A/C.6/55/SR.18).

47. There is no doubt that the formal element is common to all acts: a single manifestation of will, express in nature, whether individual or collective in origin, which produces effects by itself. This is a category of acts of a legal nature which are formulated by one or various subjects, which come into being and may produce effects as from that moment, and which generate legal effects independently of the acceptance or subsequent action of another State; this is clearly reflected in draft article 1 on the definition of such acts, which the Commission has considered and on which there appears to be general agreement.

48. The emphasis on the form of the act suggests that it is possible to develop common rules applicable to all of them, regardless of their material aspect; the draft articles on the formulation of acts represent an attempt to achieve that goal. However, given the variety of material unilateral acts and the impossibility of establishing rules common to all of them, we must attempt to classify them in order to group the rules applicable to each of these categories or groups of acts if we are to move forward in our work.

49. Before beginning this exercise, which, as we will see, requires reference, however brief, to the various material unilateral acts, we must first establish criteria on which to base any grouping of the unilateral acts with which we are concerned: unilateral legal acts in the strict sense of the term.[34] This excludes conduct and attitudes which, although of unquestionable relevance under international law, should be removed from consideration; among these are silence as a manifestation of will and attitudes and actions which, although they may produce legal effects, do not fall into the category of acts that concerns us — for example, implicit, conclusive acts of recognition or waiver or other de facto acts such as occupation, which is of historical importance.

50. As we have said, the doctrine on the various aspects of the topic of unilateral acts of States, and particularly the classification thereof, is not only rich and abundant but also diverse. Some authors offer highly interesting points of view and group together both unilateral acts in general and material unilateral acts on the basis of various criteria, some of which may be useful in the effort to establish a valid system of classification and which deserve specific mention in this report in order to facilitate the study of the topic, particularly outside the Commission. As indicated below, some authors rightly point out that the doctrine generally mentions recognition, protest, waiver and notification, a list which confuses form with content or substance with procedure.[35]

51. Some of the classic authors have addressed this issue and have arrived at interesting and useful conclusions. Pflüger, Biscottini and Venturini offer general classifications which, while important from the point of view of doctrine, are not fully applicable to the Commission's work, with its focus on the codification and progressive development of norms that can regulate the functioning of a specific category of legal acts.

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[34] Pastor Ridruejo, speaking in reference to unilateral conduct by a State, rightly notes that "the generic term unilateral conduct by a State covers three distinct possibilities: the first is that of unilateral acts in the strictest sense". *Curso de derecho internacional público y organizaciones internacionales* (Madrid, Tecnos, 1996), p. 168.

[35] Jean Combacau and Serge Sur, op. cit., p. 94.

52. Pflüger distinguishes between formal and non-formal acts; it is the second group which interests us because their completion does not require any specific form. Thus, if we accept this classification, a purely unilateral act would be an informal act. Pflüger also refers to conditional, revocable, non-conditional and non-revocable unilateral acts and to autonomous and dependent unilateral acts, the first of which correspond to the so-called "purely unilateral" acts.[36]

53. Venturini's study of unilateral acts deals with attitudes and conduct of States which may produce legal effects at the international level. With respect to unilateral acts as such, he affirms there is no doubt that the varied nature and legal basis of unilateral acts calls for a classification and reconstruction of the various types of acts in order to describe their effects. In his analysis, he rejects classifications which, in his view, have no relevance in the context of his study and makes a distinction between *negozi giuridici* (legal transactions) and acts *stricto sensu*; he also maintains that the distinction between autonomous acts and those which are dependent on other acts should be considered on the basis of general principles, and that from the point of view of effects, it would seem possible to study the voluntary unilateral acts of States by dividing them into three groups: (a) manifestations of will (*negozi giuridici*); (b) declarations other than manifestations of will; and (c) voluntary actions.

54. In the context of acts involving a manifestation of will, Venturini refers to promise and waiver, revocation, denunciation and declaration of war[37] — in other words, a classification based on the material criterion or on the content of the act. The reference to revocation is interesting and suggests the need to consider the act as such. As we shall see below, a distinction must be made between the revocation of a unilateral act and the classification of such an act according to whether it constitutes a dependent unilateral act, in other words, whether it falls into the category of unilateral acts or the sphere of treaty relations, which will determine the applicable rules.

55. Biscottini offers a classification based on a very useful criterion, that of the legal effects under the international legal system: acts in which the will plays an independent role and acts which are linked to other factors and in which the will does not play an independent role.[38] This classification is based on a criterion similar to that used by Suy, who distinguishes between constituent, extinctive, transfer and declaratory acts[39] without reference to content or to the material element, although these are discussed at length in his work on the topic.

56. Other authors take different approaches to the issue, which reflects the difficulty of establishing valid criteria. For example, Rousseau makes a distinction between express and tacit acts; the former include acts which set a condition (notification), acts which create obligations (promise and recognition), acts which confirm rights (protest) and acts through which rights are surrendered (waiver). The second category of acts is exemplified by silence, which, in some cases, is

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[36] Franz Pflüger, *Die einseitigen Rechtsgeschäfte im Völkerrecht* (Zurich, 1936), p. 64.

[37] G. Venturini, "Attitudes et actes unilatéraux des Etats" (*Recueil des cours de l'Académie de Droit International* (RCADI), vol. 112-II), p. 414 ff.

[38] Giuseppe Biscottini, *Contributo alla teoria degli atti unilaterali nel diritto internationale* (Milan, Giuffrè, 1951), pp. 18-24.

[39] Eric Suy, *Les actes juridiques unilatéraux en droit international public* (Paris, LGDJ, 1962), p. 42.

equivalent to tacit acquiescence.[40] The most interesting aspect of this classification is the author's inclusion of acts through which obligations are assumed and those through which rights are acquired in a single category: that of express acts, including notification, which, as we have mentioned, is not a legal act as such. As Combacau and Sur have noted, notification is a written procedure, the formal aspect of an act, which ensures publicity to the third parties concerned of an instrument that may have any type of content, including recognition.[41]

57. Other authors are in favour of similar criteria. Remiro Brotons classifies acts on the basis of their purpose, such as recognition, waiver or promise;[42] Daillier and Pellet agree, observing that a material classification is the most useful and adding that, generally speaking, the main categories are: notification, recognition, protest, waiver and promise.[43]

58. Verdross, relying on the material criterion or the content of the act rather than on its effects, classifies acts into independent unilateral legal transactions (notification, recognition, protest, waiver and promise); dependent international legal transactions (offer and acceptance, reservation and submission to the jurisdiction of the International Court of Justice); and, lastly, legal transactions associated with specific combined situations (occupation, dereliction and *negotiorum gestio*).[44]

59. Some authors propose more general, but no less interesting, systems of classification. Skubiszweski for example, distinguishes between the act as instrument (declaration and notification) and the act viewed from the point of view of its content and effects (recognition, protest, promise and waiver),[45] although his actual focus is on material classification.

60. Dupuy, using the criterion of effects, observes that such acts, of which there are various types, are generally considered from the point of view of their effects, which are quite varied. In particular, they may be differentiated according to whether they involve the opposability of a legal situation, the exercise of sovereign rights or the creation of legal commitments.[46]

61. Other authors also use legal effects as a criterion; for example, Jacqué distinguishes between acts which create obligations for their author, those through which a State waives a right and those through which a State confirms the existence of its rights.[47] In all three groups, he refers to two categories of acts: those through which obligations are assumed and those through which rights or legal positions are confirmed. Acts through which an author State renounces a right may fall into the first group if the criterion of legal effects is considered to be valid; thus Rigaldies distinguishes between unilateral legal acts which may create rights for third parties

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[40] Charles Rousseau, *Droit international public*, vol. I: *Introduction et sources* (Paris, Siney, 1970), p. 421.

[41] Op. cit., p. 94.

[42] Antonio Remiro Brotons, *Derecho internacional público* (Madrid, Tecnos, 1997), p. 175.

[43] Daillier and Pellet, *Droit international public* (Paris, LGDJ, 1999), p. 358.

[44] Alfred Verdross, op. cit., pp. 103-104.

[45] K. Skubiszewski, "Les actes unilatéraux des Etats". *Droit International: Bilan et perspectives* (Paris, Pédone, 1991), p. 235.

[46] Jean-Marie Dupuy, *Droit international public* (Paris, Dalloz, 1995), p. 267.

[47] Jean-Paul Jacqué, "Eléments pour une théorie de l'acte juridique en droit international" (Paris, LGDJ, 1972), p. 336.

and obligations for their author and those which may create obligations for third parties. The first are "strictly" unilateral; their autonomy is not in dispute. The second are "dependent" on other acts (cited in Venturini: La portée et les effets juridiques des attitudes et des actes unilatéraux des Etats, RCADI, 1964, vol. II).[48]

62. Valid criteria for a system of classification cannot be established on the basis of doctrine alone. The views of Governments are also of great importance in this regard. Their replies to the questionnaire prepared by the Commission in 1999 and their statements in the Sixth Committee of the General Assembly also demonstrate the variety of criteria on which a classification of unilateral acts could be based.

63. The Government of Italy, replying to the questionnaire prepared by the Commission in 1999, stated that there are three categories of unilateral acts:

> "(a) Unilateral acts referring to the possibility of invoking a legal situation. Recognition, protest and waiver belong to this category. These three types of acts require an explicit expression of consent so as to ensure certainty and security in international relations;
>
> (b) Unilateral acts that create legal obligations. This category includes promise, an act by which a State obligates itself to adhere or not adhere to a certain course of conduct. A promise has value only if the State which made it really had the intention of obligating itself by this means. It is difficult, however, to ensure that there is a real willingness to undertake obligations;
>
> (c) Unilateral acts required for the exercise of a sovereign right. Such acts are a function of the exercise of powers by States as authorized under international law (delimitation of territorial waters or of an exclusive economic zone, attribution of nationality, registration of a vessel, declaration of war or neutrality)."[49]

64. The Government of Argentina stated that:

> "a clear distinction must be drawn among the four traditional kinds of unilateral act: promise, waiver, recognition and protest. These obviously have elements in common, but the Commission must be aware that each of them may also have its own characteristics which ought to be properly identified and studied".[50]

65. The Government of El Salvador mentions, without attempting to classify them, the acts it considers most important: notification, recognition, protest, waiver, unilateral promise, declaration, appeal and resolution; the Government of Georgia, following the material criterion, considers declaration, proclamation and notification to be the main types of unilateral acts.[51]

66. The Government of the Netherlands, however, considers material classification unimportant and states that:

> "the contents of unilateral statements are not restricted to certain categories of subject matter. The Netherlands therefore considers the contents of the

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[48] Francis Rigaldies, *Contribution à l'étude de l'acte juridique unilatéral en droit international public*, p. 425.

[49] A/CN.4/511, chap. II. General comments, reply of Italy.

[50] Ibid., replies to question 4, reply of Argentina.

[51] Ibid., reply of El Salvador.

statement of secondary importance for the purpose of producing legal effects. Of greater relevance are formal criteria such as the unambiguity of the statement and the objectified intention of producing legal effects."[52]

67. A classification of the unilateral acts we are concerned with, while it may turn out to be strictly an academic exercise, has a highly relevant practical importance in this case, since it would be the basis on which groups of rules applicable to the various categories would be established.

68. The doctrine and the views of Governments on classification that have been examined demonstrate that although the criteria may vary, for the most part agreement exists on the most important material unilateral acts which are considered classic. We will need to refer to them at least briefly in order to attempt to identify the similarities and differences among them for the purpose of grouping them into specific categories.

69. Various problems arise when basing a classification on material acts, in the first place because it cannot be stated that there are no unilateral acts in existence other than the so-called "classic" unilateral acts. In addition to the acts already mentioned in the proposed classifications, some authors speak of other acts they consider unilateral, for example, Fiedler, who says that "a special place is held among the various types of unilateral acts by those practices ... included among these are, for example, recognition, protest, renunciation, notification and, at times, acquiescence and revocation". He adds that "on the other hand, it is considerably more difficult to classify those unilateral acts called declarations, assurances, promises, *promesses unilaterales de garantie* or *promesse-confirmation* or some other name. The great number of terms which have been used or suggested for use in this field have been a hindrance rather than a help towards finding a satisfactory typology."[53]

70. In effect, the possibility cannot be dismissed that there are other unilateral acts in existence which differ from the so-called "classic" acts which engage the attention of international doctrine, like those already mentioned: protest, waiver, recognition, and unilateral promise, among others. And, at the same time, it does not appear to be easy to define a unilateral act of a State and describe it as a specific type of material act since the same act can be defined in different ways, as we shall see later.

71. The diversity referred to earlier makes it impossible to draw up a restrictive list of unilateral acts from a material point of view, and this greatly complicates the grouping of rules. In addition to the classic acts already mentioned, there are unilateral declarations of neutrality and of war and negative security guarantees in the context of nuclear disarmament, and although they are different, they may resemble such classic acts as promise or waiver in the first case, recognition or promise in the second, and promise or waiver in the third.

72. Definition is also an important question that must be considered in order to be able to make a classification on the basis of a criterion other than the material criterion. For example, international doctrine and case law generally define the Ihlen

[52] Ibid., reply of the Netherlands.
[53] W. Fiedler, Unilateral acts in international law, p. 518.

Declaration as an international promise,[54] although it could also be considered a recognition or a waiver if the content is examined in the context of its definitions. Thus, for example, we note a reference to an act containing a promise when the Government of Norway, in its counter-case, said that Mr. Ihlen clearly never wished to promise the agreement of the Norwegian Government to that policy of closure.[55] The Permanent Court of International Justice took the same view in noting that by the Ihlen Declaration, the Government of Norway would not oppose the Danish claims, making a promise "not to make any difficulties", even though the legal effects of the Declaration arose within the treaty relationship. But this declaration can also be considered a recognition. Through the Ihlen Declaration, Norway acknowledged the existence of a fact with legal effect and declared its willingness to consider the acknowledged legal situation as legitimate, which appears to be reflected in the decision of the Permanent Court of International Justice of 5 April 1933 where it states that:

> "If that was the view which the Danish Government held before, during and at the close of these applications to the Powers, its action in approaching them in the way it did must certainly have been intended to ensure that those Powers should accept the point of view maintained by the Danish Government, namely, that sovereignty already existed over all Greenland, and not to persuade them to agree that a part of Greenland not previously under Danish sovereignty should now be brought thereunder. Their object was to ensure that those Powers would not attempt themselves to take possession of any non-colonized part of Greenland. The method of achieving this object was to get the Powers to recognize an existing state of fact."[56]

73. The Ihlen Declaration has also been examined in the doctrine. Kohen, when he examines forms of State conduct, in particular unilateral declarations whereby the State expresses its formal consent to a situation or a legal thesis, says that the prime example of this type of unilateral formal consent was the Ihlen Declaration. The Court did not follow the Danish interpretation, whereby Mr. Ihlen's reply constituted a recognition of Danish sovereignty.[57] In a major part of the doctrine, the Ihlen Declaration is seen as an act of recognition. Carreau, for example, says that the formal recognition by Norway of Danish claims on Greenland subsequently made it impossible to review this unilateral act and to deny its legal consequences.[58] But, in addition to being an act of recognition, through this unilateral declaration, Norway committed itself not to make any difficulties or to make any future claims, which meets the definition of a promise as a classic material unilateral act.

74. Furthermore, a declaration of neutrality, which is undoubtedly a unilateral act from a formal point of view and may be a unilateral act in the sense with which we

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[54] Garner considers the Ihlen Declaration as a promise, although he adds that it should be considered as a constituent element of an agreement. J. Garner, The binding force of unilateral declarations, in AJIL, 1933, p. 493, quoted in Suy, op. cit., p. 109.

[55] Counter-case of the Norwegian Government, p. 556.

[56] PCIJ, Judgements, series A/B, Fasc. No. 53, pp. 43-44.

[57] Kohen, op. cit., p. 280.

[58] Dominique Carreau, *Droit International* (Paris, Pédone, 1988), p. 209.

are concerned,[59] is similar to a promise, that is to say, an act by which the State formulating it assumes the obligation to adopt a certain conduct in the future.

75. In the case of the Austrian declaration of neutrality, which some regard as unilateral, others as conventional,[60] and which is contained in the Constitution of 1955, it may be noted that in the Memorandum of 15 April 1955 signed by the delegations of Austria and the Soviet Union,[61] Austria undertook (a) to make a declaration in a form which would obligate Austria internationally to practise in perpetuity a neutrality of the type maintained by Switzerland; (b) to submit it to the Austrian Parliament for decision immediately after the ratification of the State Treaty with Austria; (c) to take all suitable steps to obtain international recognition of the declaration confirmed by the Austrian Parliament; (d) to welcome a guarantee by the four great Powers of the inviolability and integrity of the Austrian State territory; (e) to seek to obtain such guarantee.

76. Regardless of the definition which might be given to the declaration, which is a matter of subjective interpretation, it is of interest to determine the legal effects of the unilateral act and here we shall refer in some measure to classic material unilateral acts so as to be able to identify the similarities and differences between them, once again for the purpose of attempting to develop groups of rules applicable to the two categories referred to.

77. Unilateral acts produce direct legal effects in relation to their addressee. However, such acts can also produce indirect legal effects, like those which contribute to the formation or confirmation of the existence of customary norms or to the formation of general principles of law.

78. All the acts mentioned, in the context which concerns us, are formulated[62] through unilateral declarations, whether of individual or collective origin, and these declarations are subject to definite forms as far as their conditions of validity are concerned; the rules apply to all of them regardless of their content or material classification. A promise, waiver, recognition, protest or any other act is formulated through a manifestation of will with the intention of producing legal effects, and it is

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[59] Not all authors agree that the declarations of neutrality which have been formulated are unilateral acts. Reuter, for example, considers that declarations of neutrality of Belgium (treaties of 1831 and 1839), Luxembourg (treaty of 1867), Switzerland (Act of 20 November 1815), Austria (1955), and Laos (1962) constitute declarations established in treaty form. Paul Reuter, *Droit international public* (Paris, PUF, 1970), p. 1170.

[60] The declaration by Austria caused different reactions from States. Some accepted it by silence, others, for instance the four great Powers, did so through express acts of recognition. As for whether this declaration of neutrality constitutes a unilateral promise or a distinct legal act, the doctrine responds to this question in different ways. For Fiedler "the proclamation of the perpetual neutrality of Austria by the Federal Constitutional Act of 26 October 1955 has been characterized as a unilateral promise" (Fiedler, op. cit., p. 518). For Combacau and Sur some of these declarations have a unilateral character, like that of Austria, while others are conventional, like the declaration of neutrality formulated by Switzerland. The acceptance of a unilateral act is, according to Zemanek, necessary when it affects the interests of other States: "They then need acceptance or, at least, acknowledgement to achieve legal force", referring to the Note sent by the Government of Austria to the four signatories of the "State Treaty" of 1955: France, the United Kingdom, the United States and the Soviet Union, to which the Governments of those countries replied that they agreed with the position of Austria.

[61] The question still arises as to whether this Memorandum constitutes or reflects an agreement among the parties, given the fact that it was signed by the heads of delegations.

[62] Combacau and Sur, op. cit., p. 96.

those effects which vary. Of course, as has been stated several times, other manifestations of will separate from the legal act *stricto sensu* can produce legal effects, but they are outside the scope of the study of such acts which the Commission has undertaken.

79. Through a promise the author State assumes an obligation. The doctrine is clear in this respect, as are the references made by international courts. A promise is a unilateral declaration whereby a State undertakes to adopt certain conduct towards another State or States, without subjecting this conduct to any kind of quid pro quo by the beneficiary of the promise.[63] It is a unilateral legal act whereby a State commits itself to certain conduct towards others.[64]

80. The study of promises in the doctrine, in contrast to other so-called "classic" material acts, is much more recent and perhaps, as Jacqué says, quoting Quadri and Suy, it is impossible to cite cases of unilateral promises prior to the League of Nations; they were treated as conventional acts.[65]

81. International courts have examined the promise as a legal act in various cases, among which, in particular, since they are recent and the subject of an interesting doctrinal discussion, we may note the declarations formulated in the context of the *Nuclear Tests* case, concerning which the International Court of Justice indicated that a promise could bind its author on condition that it was given publicly and that its intention was clear; this was further developed by Judge de Castro in his dissenting opinion, when he said that "there is a difference between a promise which gives rise to a moral obligation (even when reinforced by oath or word of honour) and a promise which legally binds the promiser". The Court, moreover, specified that a promise that gave rise to a legal obligation would constitute a strictly unilateral act without any form of quid pro quo, acceptance, reply or reaction.[66]

82. The legal effect of a promise is to create new rights in favour of a third party and of course, obligations for the author State; unlike other unilateral acts, which relate to existing facts or actions, a promise (or assurance) gives rise to new rights to the benefit of third parties.[67]

83. In the context of unilateral promises we observe unilateral declarations formulated by certain European States in relation to the protection of minorities and declarations of acceptance of the binding jurisdiction of the International Court of Justice,[68] although some consider that those declarations are not purely unilateral acts since they must take place in a treaty relationship, which seems acceptable; this matter will not be discussed now since it was examined in prior reports.

84. When speaking of acts by which the State assumes unilateral obligations, we cannot make exclusive reference to promises since the State can assume unilateral obligations through other equally unilateral acts in the sense we are considering. More broadly, this category should encompass other acts whatever their material classification or content, for example waiver, recognition, declaration of neutrality

[63] Rodriguez Carrion, op. cit., p. 172.

[64] Francis Rigaldies, op. cit. p. 426. A. Verdross, op. cit., p. 104.

[65] Jean-Paul Jacqué, "A propos de la promesse unilatérale", in *Mélanges offerts à Paul Reuter, le droit international: unité et diversité*, p. 327.

[66] *I.C.J. Reports 1974*, p. 374. Cited in F. Rigaldies, op. cit., pp. 427-428.

[67] Daillier and Pellet, *Droit international public* (Paris, LGDJ, 1999), p. 359.

[68] Balladore-Pallieri, Diritto internazionale pubblico, pp. 295-298, quoted in Suy, op. cit., p. 110.

or other acts by which States commit themselves unilaterally, which coincides with what was said by one representative in the Sixth Committee, who felt that "while there was merit in the suggestion that the study of specific categories of unilateral acts should begin by concentrating on those acts which created obligations for the author State, it was questionable whether that category should be limited to promises".[69]

85. It is not only through a promise that an author State can assume unilateral obligations in relation to one or more States, in any case its addressees. A promise gives rise to unilateral obligations, although it is not the only unilateral act that creates obligations.[70] Other material acts, in fact, have a similar legal effect in the sense that through them the author State assumes such obligations as recognition or waiver.

86. By waiver, which produces the extinction of a right because it does not provide for its transfer to other subjects[71] the State abandons a right or a claim, but at the same time assumes or undertakes an obligation. The legal effect that the unilateral act of waiver produces is expressed in the State's obligation no longer to contest the rights that another State has acquired through the waiver.[72]

87. In addition, at the risk of exceeding the scope of the topic, it should be recalled that waiver, as has been established in international case law,[73] must be express, and consequently cannot be assumed.[74] While, as noted by the arbitral tribunal established for the Campbell case, if the possibility of a tacit waiver is allowed, it must be inferred from facts that allow no other interpretation.[75] Judge Badesvant, at the public hearing of 26 April 1932 at the Permanent Court of International Justice, during the consideration of the case of the *Free Zones of Upper Savoy*, said that as for tacit waiver, it was a matter of principle that a right could not easily be assumed to have been renounced; in order for the idea of waiver to be accepted, unequivocal acts would have to be invoked to establish that at a time when it had the interest and practical ability effectively to claim its right of lapse, France voluntarily refrained from claiming it, and that this abstention implied an intention of waiver. Only then, in accordance with the principles of law, could waiver be established. Before 1919, however, France had never had the practical ability effectively to claim its right to lapse of the treaties of 1815 to 1816.[76]

88. As we know, a waiver can also be embodied in a treaty; this, by its very nature, is separate from our consideration of this subject. Indeed,

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[69] Statement by the representative of Finland on behalf of the Nordic countries (A/C.6/55/SR.19, para. 36).

[70] Skubiszweski, op. cit., note 45, p. 241.

[71] Venturini, op. cit., p. 414.

[72] Philippe Cahier, "Le comportement des Etats comme source de droits et des obligations". *Recueil d'Etudes de droit international en hommage à Paul Guggenheim*, pp. 247-248. IHEI, Geneva, 1968.

[73] Cases of *Crown Prince Gustav Adolf* and the *Norwegian loans*. Quoted in Skubiszewski, op. cit., p. 342.

[74] *Lotus* case, 1927, P.C.I.J., Series A, No. 10, p. 17.

[75] Arbitral award of 10 June 1931 (UNRIAA, vol. II, p. 1156; quoted in Kohen, op. cit., p. 357).

[76] Extract from Kiss, *Repertoire française de Droit International Public*, vol. I, 1962, p. 644.

> "... If the waiver is stipulated in a treaty it loses its unilateral character because the effect depends on the treaty's entry into force, i.e. on the will of the other contracting party or parties. Nor is waiver unilateral when it is linked to the transfer of the abandoned claim, right, competence or power to another State or States: in such case it again becomes a contractual transaction."[77]

89. As for the effects of a waiver, which some authors compare with a promise or consider as a type of promise,[78] it must be borne in mind that it amounts to an act of disposal of a right, unlike a promise, which is simply the exercise of a prerogative. Consequently, it is incorrect to refer to a waiver of territorial sovereignty. The obligation to give up a territory to another sovereign State does not arise from a waiver but from a promise or the acceptance of a proposal.[79]

90. Legal acts containing a waiver can be considered valid in international practice, as international courts have noted. This applies to the *Free Zones of Upper Savoy and the District of Gex* case between France and Switzerland,[80] in which France formally took the position that a waiver as a unilateral act in international law was binding on the waiving State.[81]

91. A State may also undertake unilateral obligations through recognition, and such obligations may be considered autonomous or independent if that is the context in which they arise or are formulated. Recognition, express or tacit, can also in terms of its legal effects be assimilated to acts for which the State undertakes a unilateral obligation; we are of course referring to express recognition formulated by means of a unilateral act in the strict sense we are discussing. Through recognition,[82] a State accepts a de facto situation, a legal claim, a competence or a power[83] and thereby undertakes in some manner to conduct itself in a certain way. Through recognition, the author State takes note of the existence of certain facts or certain legal acts and acknowledges that they are available against it.[84] Recognition is the procedure whereby a subject of international law, particularly a State, which was not involved in bringing about a situation or establishing a legal instrument, accepts that such situation or instrument is available against it, or in other words acknowledges the applicability to itself of the legal consequences of the situation or instrument. Recognition is a unilateral act.[85]

92. As Oppenheim observes,

> "in a broad sense recognition involves the acceptance by a State of any fact or situation occurring in its relations with other States ... The grant of recognition is an act on the international plane, affecting the mutual rights and obligations of States, and their status or legal capacity in general ... The grant of

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[77] Skubiszewski, op. cit., p. 229.
[78] A. Miaja de la Muela, *Los actos unilaterales*, p. 461. Quoted in R. Quadri, op. cit., p. 576.
[79] R. Quadri, op. cit., note 78, pp. 575-576.
[80] PCIJ, 1932, Series A/B, No. 46.
[81] Rubin, The international legal effects of unilateral declarations. AJIL, vol. 71, 1977, p. 14.
[82] Considered by most authors as the most important unilateral act. Skubiszewski, op. cit., p. 238; Daillier and Pellet, op. cit., p. 358; Verdross and Simma, *Universelles Völkerrecht: Theorie und Praxis* (Berlin, 1976), p. 427.
[83] Skubiszewski, op. cit., p. 241.
[84] Daillier and Pellet, op. cit., p. 358.
[85] Daillier and Pellet, op. cit., p. 550.

recognition by a State is a unilateral act affecting essentially bilateral relations."[86]

93. There are many examples of legal practice relating to recognition of States, Governments, State neutrality, insurgency and belligerency. Also noteworthy are the Egyptian declaration of 24 April 1957 recognizing the validity of the Constantinople Convention of 1888 concerning the Suez Canal, which gave rise to diverse opinions on doctrine relating to its unilateral nature.[87] To focus on recent practice, we may note the guidelines issued by the European Community on 16 December 1991 relating to the recognition of new states in Eastern Europe and the former Soviet Union, in which a common position on the process of recognition of the new States was adopted. The European Community adopted a declaration concerning the former Yugoslavia, in which the Community and its member States recognized those former Yugoslav republics which satisfied certain conditions.[88] The recognition by Italy of Malta's declaration of neutrality of 15 May 1980 should also be borne in mind.[89]

94. In contrast to recognition, in the case of a protest the State does not unilaterally undertake obligations, but rather prevents the formation of a right, a title or a legal position. The author State in no way undertakes an obligation; on the contrary, it seeks to reaffirm a right by preventing another State from acquiring it.

95. A protest is a classic material act which be effected either through a form of conduct or conclusive acts,[90] or through a legal act in the sense referred to by the definition contained in draft article 1 examined by the Commission during its past session. A protest is a unilateral act whereby a subject of law manifests its intention not to consider a given state of affairs as legal and intends thereby to safeguard its rights which have been violated or threatened.[91] The legal effect of the protest is that the contested state of affairs is no longer available against the protesting State, which can continue to enforce its own rights.[92] According to Oppenheim, "a protest is a formal communication from one State to another that it objects to an act performed or contemplated by the latter. A State can lodge a protest against acts which have been notified to it or which have otherwise become known. A protest principally serves the purpose of preserving rights, or making it known that the protesting State does not acquiesce in, or does not recognize, certain acts — but it does not nullify the act complained of."[93]

96. Declarations which constitute protests are frequent in practice, and thus have been examined by international doctrine and case law. Among others, we may note the case of the *Chamizal* arbitration, between Mexico and the United States of

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[86] *Oppenheim's International Law*, 9th ed., vol. I (London, Longman, 1992), Sir Robert Jennings and Sir Arthur Watts, eds., pp. 127, 128 and 130.

[87] The declaration by the Government of Egypt was registered with the Secretariat of the United Nations (United Nations, *Treaty Series*, vol. 265, p. 299), although it was not an international treaty.

[88] See *British Yearbook of International Law*, vol. 62, 1991, pp. 559-560.

[89] International Legal Materials, 1982, p. 396.

[90] Pflüger, quoted by Suy (op. cit., p. 51) mentions direct or indirect implicit conduct, express or tacit conduct and explicit or implicit conduct. Thus, he describes as implicit actions (of protest) an action before a court, breaking off diplomatic relations, or the declaration of war.

[91] Suy, op. cit., p. 48.

[92] Suy, op. cit., p. 80.

[93] Oppenheim, op. cit., note 86, p. 1194.

America,[94] that of the nationality decrees between Tunisia and Morocco,[95] and the *Minquiers and Ecrehos* case.[96]

97. Following this brief and referential consideration of certain unilateral legal acts, it may be concluded that they can be grouped into two major categories according to their legal effects; this will make it possible to structure the draft articles which are to be presented. The two categories are: acts whereby the State undertakes obligations, and acts whereby the State reaffirms a right. The first of these will be taken up in the first part of the draft articles, as a group for which common rules can be elaborated.

98. A general part relating to formulation can be common to all acts: it can be maintained, supplemented and improved; and the draft articles can be divided into three parts: a general section; a first part, relating to acts whereby the State undertakes obligations; and a second part, containing rules relating to acts whereby the State reaffirms a right or a legal position or claim.

99. The Special Rapporteur proposes, as suggested by the Commission itself and the members of the Sixth Committee, to concentrate on the first part and to deal at some future time with rules relating to the second category of acts.

100. In the case of interpretation, which is discussed below, the Special Rapporteur will provide an overview of the subject and its relevance to unilateral acts in general, and then present conclusions applicable to all acts.

II. Rules relating to the interpretation of unilateral acts

A. Observations of the Special Rapporteur

101. During the discussion held in the Commission in 2000, it was concluded that common rules could be elaborated relating to certain issues concerning unilateral acts, but not relating to all aspects, which led to the earlier exercise on the classification of unilateral acts on which the draft articles to be prepared by the Commission on this subject would be based. In this context the general issue of interpretation of legal acts will be reviewed, with particular reference to unilateral acts, in order to submit draft articles for consideration by the Commission. In State practice as reflected in the case law of international courts, it may often be observed that disputes arise in relation to the interpretation or application of the text of a treaty, either bilateral or multilateral, or the interpretation of a unilateral act, whether an act that intervenes in a treaty relationship or an independent unilateral act.

102. Any attempt to elaborate specific rules of interpretation applicable to unilateral acts entails answering two questions which we see as fundamental: firstly, whether the rules of interpretation of the 1969 Vienna Convention are applicable mutatis mutandis to unilateral acts or should be taken as a valid reference in elaborating rules in this area; and secondly, whether it is possible in any case to elaborate rules

[94] Decision of 15 June 1911, AJIL, vol. 5, 1911, pp. 785-833.
[95] Consultative opinion, PCIJ, Collection 1923, Series B, No. 4.
[96] *France v. United Kingdom, I.C.J. Reports 1953.*

common to all unilateral acts or whether, on the contrary, there is a need for separate rules applicable to each category of unilateral acts.

103. In their replies to the questionnaire prepared by the Commission, some Governments, such as those of Finland, Italy and the Netherlands, were in favour of applying by analogy to unilateral acts the rules on interpretation contained in articles 31 to 33 of the 1969 Vienna Convention on the Law of Treaties.[97]

104. Other Governments were more cautious. Thus, the Government of Israel pointed out that:

> "the process of defining a unilateral act as one which produces legal effects is essentially an exercise in interpreting the intention of the State which engages in the unilateral act. It is because of the difficulty associated with ascertaining the true intention of the State that strict rules of interpretation should be applied in order to determine whether a unilateral act produces legal effects. In this regard, the need to subject the unilateral act to a good faith interpretation in accordance with its ordinary meaning, along the lines of article 31 of the Vienna Convention on the Law of Treaties, is an important, though insufficient, part of the interpretation process. In addition, and as indicated in draft article 2 of the second report on unilateral acts of States, the unilateral legal act must be an unequivocal and autonomous expression of will, formulated publicly, and directed in explicit terms to the addressee of the act. In this context, it should be emphasized that the failure to adopt rigid standards of interpretation would not only undermine the effectiveness of the legal regime regulating unilateral acts, but would also place States in an impossible position by threatening to attribute legal consequences to unilateral acts which were not intended to have such an effect."[98]

105. For its part, the Government of Austria stressed that:

> "in the 1998 *Fisheries Jurisdiction Case (Spain v. Canada)*, the International Court of Justice considered the regime relating to the interpretation of unilateral declarations made under Article 36 of the Statute of the Court not to be identical with that established for the interpretation of treaties by the Vienna Convention on the Law of Treaties. The Court observed that the provisions of that Convention may only apply analogously to the extent compatible with the sui generis character of the unilateral acceptance of the Court's jurisdiction. The Court explained further that it would interpret the relevant words of such a declaration, including a reservation contained therein, in a natural and reasonable way, having due regard for the *intention* of the State concerned at the time when it accepted the compulsory jurisdiction of the Court. Moreover, the intention of the State concerned could be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served. With respect to the interpretation of these unilateral acts, therefore, it appears that the Court attaches much higher interpretative significance to the subjective element, than would be permissible under the rules of "objective" treaty interpretation pursuant to articles 31 and 32 of the Vienna Convention on the Law of Treaties. How far this subjective

[97] Document A/CN.4/511. Replies to question 7, Finland, Italy and the Netherlands.
[98] Ibid. Reply by Israel.

element can be taken and whether or to what extent the same reasoning is applicable to other categories of unilateral acts remains unclear."[99]

106. In the view of the Government of Argentina:

"one area where a distinction must be made between the rules of the law of treaties and those applicable to unilateral acts is that of the interpretation of unilateral acts. As stated by the International Court of Justice in the *Nuclear Tests* cases, when a State makes a declaration limiting its future freedom of action, a restrictive interpretation must be made. This is simply a corollary of the famous dictum of the Permanent Court of International Justice in the *Lotus* case, to the effect that restrictions on the sovereignty of States cannot be presumed. As in any unilateral juridical act, the intention of the author of the act (in this case, the State or, more precisely, the organ of the State) plays a fundamental role. For this, one crucial element must be borne in mind, namely, the circumstances surrounding the act; in other words, the context in which the act takes place may determine its interpretation."[100]

107. Through interpretation, the judge seeks to determine the intention of the State which is a party to a conventional act or the author State of a unilateral act; for that purpose, the text of the instrument or the terms of the declaration prevail over any other source. As is well known, interpretation is an effort to determine the sense of a legal rule, treaty, declaration, judicial decision, etc.[101] It is a positive activity with a specific objective, which is to determine the will of the parties on the basis of a text;[102] the latter term is not limited to conventional acts, but should be construed as being applicable also to oral and written declarations. Ultimately, it is an intellectual activity whose purpose is to determine the meaning of a legal act, define its scope and clarify any obscure or ambiguous points.[103]

108. In order to address the question of interpretation and the applicable rules, a distinction must first be drawn between conventional acts and unilateral acts, from both the formal and material points of view,[104] since this will enable us to consider whether the Vienna rules can be transposed to the regime of unilateral acts, or give proper consideration to these rules, based on a flexible parallel approach.

109. From the formal point of view, the fundamental difference resides in the fact that a conventional act is the result of the concerted wills of two or more subjects of international law, whereas a unilateral act is the manifestation of the will of one or more States in individual, collective or concerted form, in which other States, and in particular the addressee State, do not participate. Furthermore, from the material point of view, a unilateral act is an act which creates rules in relation to subjects of

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[99] Ibid. Reply by Austria.

[100] Ibid. Reply by Argentina.

[101] J. Basdevant, *Dictionnaire de la terminologie du droit international* (Paris, Sirey, 1960), pp. 346-347. Grotius writes: "The measure of correct interpretation is the reference of intent from the most probable indications." In *De jure belli ac pacis* (book 2, chap. 16); cf. *Encyclopedia of Public International Law*, vol. 2 (Amsterdam, Elsevier, 1995), p. 1418.

[102] Paul Reuter, *Introduction au droit des traités* (Paris, PUF, 1985), p. 88, para. 141.

[103] Charles Rousseau, op. cit., vol. I, p. 241.

[104] See Jean Charpentier, "Engagements Unilatéraux et Engagements Conventionnels: différences et convergences", in *Theory of international law at the threshold of the 21st century: essays in honour of Krzyszrof Skubiszewski* (The Hague/Boston, Klawer Law International, 1996), pp. 367-380.

law other than its authors, whereas a conventional act — or agreement — gives rise to the creation of rules applicable to its authors.[105]

110. The legal effects which a conventional act may produce reflect the will of the parties involved in its elaboration and it is in relation to this that its legal effects are produced. As Reuter points out, it can be easily understood that the nature of a conventional act is that it entails mutual undertakings between the two parties concerned, [106] whereas the nature of a unilateral act entails undertakings on the part of the author State and the acquisition of rights by the addressee State or obligations incumbent on the addressee State or States, in the case of acts by which the State is reaffirming a right or a legal claim.

111. The difference between the two can lead to differences of opinion over how an act should be interpreted, including aspects such as its duration, revocability and amendment, which will need to be addressed at a later stage, when attempting to draw up specific rules for each category of unilateral legal acts, since here again the question will have to be examined in depth in order to ascertain whether rules common to both categories of unilateral acts may be established.

112. In general, the effects of a legal act are based on the intention of the States taking part in its elaboration or formulation. With specific reference to unilateral acts, the Court reiterated clearly in the *Nuclear Tests* cases that: "When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration."[107] It is important to point out at this juncture that conventional acts produce effects and impose obligations on the parties from the time of their entry into force, although prior obligations may exist as laid down in the 1969 Vienna Convention.[108] A unilateral act, however, produces effects at the time when it is formulated, in other words the act is opposable to the author State and enforceable by the addressee State from that time onward, which does not fully coincide with its coming into being, something which must be considered separately, as we shall see below. As we shall also see in due course, the bilateral nature of the relationship does not affect the unilateral character of an act formulated by a State with the intention of producing legal effects in relation to third States.

113. It is important to stress that, by formulating a unilateral legal act, the author State may assume a unilateral obligation, in the case of the first category of such acts. This is also possible in the case of conventional acts when a treaty, which is the product of the concerted or combined wills of the parties, contains obligations only

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[105] See Jacqué, op. cit., p. 320.

[106] Paul Reuter, *Principes de Droit International*, RDCADI, 1961, vol. II, p. 564.

[107] *I.C.J. Reports 1974*, p. 267, para. 43.

[108] Article 18 of the Vienna Convention imposes obligations on a State signatory to a treaty. The article stipulates that:

> "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
>
> (a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
>
> (b) It has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

incumbent on one State party, in other words unilateral obligations, even though from the formal point of view it remains a conventional act.

114. As a general rule, when interpreting legal acts, reference has always been made to the declared will and true will of the author State or States. International case law and doctrine have generally favoured the criterion of declared will, while also taking into consideration the true will expressed by the author State or States. The 1969 and 1986 Vienna Conventions refer to the principle of declared will, but also take into consideration the context, object and purpose of the act, any subsequent agreements and practices, and even any relevant rules of international law applicable between the author State and the addressee State; reference can also be made to supplementary means of interpretation, such as the preparatory work of the treaty and the circumstances of its conclusion, in accordance with articles 31 and 32 of the above-mentioned conventions, which may be applicable to unilateral acts.

115. Interpreting the intention of the authors of a conventional act is less complex than in the case of a unilateral act. In fact, as Sicault says, when there is a difference in a treaty between the true will of the parties and the text of the treaty, this difference is due to negligence on the part of the authors, but, unless the aim was fraudulent, the parties know what their common intention was, even if it is reflected only imperfectly in the text; they have at their disposal the same means and the same facilities to express in more precise terms the matter on which they are agreed; this is not the case for unilateral undertakings. Only the subject which has expressed the undertaking knows its true intention.[109]

116. As pointed out above, the aim of interpretation is to determine the intention of the parties to an act or of the State or States which formulate an act, giving priority to the terms of the agreement or declaration as appropriate. An interpretation of this kind, based first and foremost on the terms and their meaning, has been given by the Court in various cases, notably the *Aegean Sea Continental Shelf* case, in which the Court scrupulously examined the terms of the reservations formulated when the parties acceded to the General Act of 1928. In this decision, the Court considered the question of the grammatical interpretation of the words "*et notamment*" ("and in particular") which preceded the reference to "*différends ayant trait au statut territorial de la Grèce*" ("disputes relating to the territorial status of Greece"). The Government of Greece maintained that "the natural, ordinary and current meaning of this expression absolutely precludes the Greek reservation from being read as covering disputes regarding territorial status".[110] The Court even looked carefully at the commas placed before and after the word "*notamment*". It is important to stress that the Court felt that the grammatical arguments were compelling and decisive. In this connection, in the same judgement, the Court added that it "is not a matter simply of their preponderant linguistic usage" when "the meaning attributed to "*et notamment*" is grammatically not the only, although it may be the most frequent, use of that expression ... the meaning attributed to it thus depends on the context in which those words were used".

117. However, the Court does not confine itself to grammatical analysis to interpret texts, as can be seen clearly from the *Anglo-Iranian Oil Co.* case. Here, the Court considered the declaration by Iran, in particular the words "*et postérieurs à la ratification de cette déclaration*", which followed immediately after the expression

[109] Didier Sicault, "Du caractere obligatoire des engagements unilatéraux", RGDIP, 1978, p. 648.
[110] *I.C.J. Reports 1978*, para. 51.

"*traités ou conventions acceptés par la Perse*". The Court noted that it "cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text."[111]

118. With specific reference to unilateral acts, international case law is important, especially the *Nuclear Tests, Military and Paramilitary Activities* and *Frontier Dispute* cases, among others, in which the Court considered unilateral declarations formulated by the authorities of States parties to the dispute concerned.

119. In its judgement of 27 June 1986 in the *Military and Paramilitary Activities* case, the Court stipulated that it could not "take the view that Nicaragua actually undertook a commitment to organize free elections, and that this commitment was of a legal nature. The Nicaraguan Junta ... planned the holding of free elections as part of its political programme of government, following the recommendation ... of the Organization of American States. This was an essentially political pledge ... the Court cannot find an instrument with legal force, whether unilateral or synallagmatic, whereby Nicaragua has committed itself".[112]

120. When considering another unilateral act in the *Frontier Dispute* case between Burkina Faso and Mali, the Court noted that "in order to assess the intentions of the author of a unilateral act [which may give rise to a legal obligation], account must be taken of all the factual circumstances in which the act occurred. ... There are no grounds to interpret the declaration made by Mali's head of State on 11 April 1975 as a unilateral act with legal implications in regard to the present case."[113] If the States concerned can commit themselves by the normal means of a formal agreement, there is no reason to interpret the declaration made by one of them as a unilateral act giving rise to legal effects. It is a different matter when the States concerned are all the States of the world and any one of them can express consent to be bound only through unilateral declarations.

121. In other cases, the Court has considered unilateral declarations by States, such as those regarding acceptance of the Court's jurisdiction, which are of great value, regardless of whether they can be considered as formally unilateral declarations made in the context of a treaty relationship.

122. In the *Anglo-Iranian Oil Co.* case, in which the Court considered the declaration by Iran, it should be recalled that the United Kingdom maintained that the rules governing the interpretation of treaties did not apply to unilateral acts. The Court then pointed out that

> "it may be said that this principle should in general be applied when interpreting the text of a treaty. But the text of the Iranian Declaration is not a treaty text resulting from negotiations between two or more States. It is the result of unilateral drafting by the Government of Iran, which appears to have shown a particular degree of caution when drafting the text of the Declaration. It appears to have inserted, *ex abundanti cautela*, words which, strictly speaking, may seem to have been superfluous. This caution is explained by the

[111] *I.C.J. Reports 1952*, p. 104. See also the *South-West Africa* case, *I.C.J. Reports 1962*, p. 336; and the Arbitral Award of 31 July 1989, *I.C.J. Reports 1991*, pp. 69-70, para. 48.

[112] *I.C.J. Reports 1986*, p. 132, para. 261.

[113] Ibid., p. 574, para. 40.

special reasons which led the Government of Iran to draft the declaration in a very restrictive manner."[114]

123. It is interesting to note that the rules laid down in the Vienna Conventions have also been applied when interpreting arbitral decisions, such as the *arbitral award of 31 July 1986* in the case between Senegal and Guinea-Bissau and the delimitation award in the *Laguna del Desierto* case between Chile and Argentina. In the latter case, it was pointed out that under international law there are rules which are used for the interpretation of any legal instrument, be it a treaty, a unilateral act, an arbitral award or the resolution of an international organization. These are thus general rules of interpretation dictated by the natural and ordinary meaning of words, reference to context and effectiveness.[115]

124. In the Guinea/Guinea-Bissau Award, the Tribunal noted that although neither of the States was a party to the Vienna Convention on the Law of Treaties of 29 May 1969, it was not disputed by the two States in question that articles 31 and 32 of this Convention were the relevant rules of international law governing the interpretation of the 1886 Convention. In the light of that agreement between the parties and the practice of international courts as regards the applicability of the provisions of the Convention on the Law of Treaties in line with international custom recognized among States (see in particular *Legal Consequences for States of the Continued Presence of South Africa in Namibia, I.C.J. Reports 1971*, p. 47, para. 94; *Fisheries Jurisdiction, I.C.J. Reports 1973*, pp. 18 and 63, para. 36), the Tribunal could not base itself on the aforementioned articles 31 and 32.[116]

125. With regard to unilateral acts by which a State assumes obligations which determine future conduct, in the *Nuclear Tests* case, the International Court of Justice held that "not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound — the intention is to be ascertained by interpretation of the act".[117] In the *Frontier Dispute* case between Burkina Faso and Mali, however, the Chamber of the Court examined a unilateral declaration and took the view that it was not a unilateral legal act. The Chamber concluded that "there are no grounds to interpret the declaration made by Mali's head of State on 11 April 1975 as a unilateral act with legal implications in regard to the present case".[118]

126. Before attempting to establish rules of interpretation applicable to unilateral acts, reference should be made to the basic criterion distinguishing the way in which unilateral acts are interpreted from the way in which conventional acts are interpreted. As has been pointed out, the latter are acts elaborated for a specific purpose and this means that specific criteria are used. The interests of legal certainty require that the main criterion should be the will expressed in the text, particularly in the case of acts by which the State concerned assumes unilateral obligations and, furthermore, as the Court itself pointed out in the *Nuclear Tests* case referred to above, such acts should be interpreted restrictively.

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[114] *I.C.J. Reports 1952*, p. 105.

[115] Arbitral Award of 21 October 1994. Dispute concerning the course of the Frontier between B.P. 62 and Mount Fitzroy (Argentina/Chile), RGDIP, 1996, vol. 2, p. 552.

[116] Arbitral Tribunal for the Delimitation of the Maritime Boundary between Guinea/Guinea-Bissau, Award of 14 February 1985, RGDIP, 1985, vol. 89, p. 503, para. 41.

[117] *I.C.J. Reports 1974*, p. 267, para. 44.

[118] *I.C.J. Reports 1986*, p. 574, para. 40.

127. In accordance with the case law and the doctrine, there is no doubt whatever that the restrictive criterion predominates in this context. Indeed, as the International Court of Justice clearly stated in the above-mentioned *Anglo-Iranian Oil Co.* case, "the Court cannot base itself on a purely grammatical interpretation of the text. It must seek the interpretation which is in harmony with a natural and reasonable way of reading the text".[119] More recently, in the *Fisheries* case (Spain v. Canada), the Court indicated that "since a declaration under Article 36, paragraph 2, of the Statute is a unilaterally drafted instrument, the Court has not hesitated to place a certain emphasis on the intention of the depositing State".[120] Turning from declarations of acceptance of the Court to another context — declarations that have been defined as a unilateral international promise — the Court, in its decision in the *Nuclear Tests* case, stated that "when States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for".[121]

128. In the case of waivers, in particular, it should be noted that the rule of non-presumption would then be a rule of restrictive interpretation; in cases where there is a doubt as to the will to waive, it should be assumed that the subject of law did not wish to do so.[122]

129. The rules of interpretation on unilateral acts must be based on the consolidated rules laid down in the 1969 and 1986 Vienna Conventions, adapted, of course, to the specific characteristics of unilateral acts. In the first place, there is no doubt that the general rule of interpretation set out in the above-mentioned article 31 of the Vienna Conventions, whereby treaties shall be interpreted in good faith, is entirely applicable to unilateral acts.

130. Article 31, which is common to the two Conventions, establishes that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty". The principle of good faith is one of the fundamental principles of the operation of interpretation which requires an effort to determine what the parties really meant";[123] this is also pointed out by the Institute of International Law in its Granada resolution of 19 April 1956.

131. There is no reason why this basic principle applicable to treaty relations should not be considered in the relations established by the formulation of a unilateral act. An act which is unilaterally formulated by a State must be interpreted in good faith, that is, in accordance with what the author State really intended to say. The task of the interpreter is, precisely, to attempt to identify the intention of the parties or, in this context, of the State which unilaterally formulates the act. Good faith and the meaning of the terms as a starting point are the point of departure of the interpretation process.[124] And, if this is recognized, logic dictates that the ordinary meaning to be given to the terms of the declaration, either orally or in writing, in its context and in the light of its object and purpose, should be mentioned in the first place, which would not per se dispel doubts as to desired and expressed will.

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[119] *I.C.J. Reports 1952*, p. 104.
[120] *I.C.J. Reports 1998*, para. 48.
[121] *I.C.J. Reports 1974*, para. 44.
[122] Cahier, op. cit., p. 255.
[123] Rousseau, op. cit., p. 269.
[124] *Yearbook of the Institute of International Law* (Bath, 1950), vol. 43/I, p. 433.

132. International case law has been clear in this regard. Thus, in the *Nuclear Tests* case, the Court stated that "one of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation ... Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration."[125]

133. At the outset, we had pointed out that it was essential to define whether the rules that may be elaborated on interpretation could be common to all unilateral acts within the meaning that is of interest to the Commission, that is, acts whereby the State expressly assumes unilateral obligations, and acts whereby the State reaffirms a right or a legal claim. The rule of good faith is, without any doubt whatever, applicable to all categories of unilateral acts.

134. Within the scope of conventional acts, as is known and as was recalled earlier, the exercise of interpretation includes consideration of the context in the light of the treaty's object and purpose, and it is understood that the context is comprised of the preamble and the annexes. Furthermore, consideration is given to "subsequent agreements between the parties regarding interpretation of the treaty or the application of its provisions" and "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation and any relevant rules of international law applicable in the relations between the parties", which reflects what has already been said about the comprehensive system embodied in the Vienna Conventions.

135. In relation to the context, there does not seem to be any doubt that it must be considered at the time of attempting to determine the real will of the author of the unilateral act. In the above-mentioned *Anglo-Iranian Oil Co.* case, the Court stated that: "This clause ... is ... a decisive confirmation of the intention of the Government of Iran at the time when it accepted the compulsory jurisdiction of the Court".[126]

136. In the *Fisheries* case between Spain and Canada, the Court also interpreted Canada's declaration of acceptance of the jurisdiction of the Court and indicated that:

> "a declaration of acceptance of the compulsory jurisdiction of the Court, whether there are specified limits set to that acceptance or not, is a unilateral act of State sovereignty ... The Court will thus interpret the relevant words of a declaration ... in a natural and reasonable way, having due regard to the intention of the State concerned at the time when it accepted the compulsory jurisdiction of the Court [that] ... may be deduced not only from the text of the relevant clause, but also from the context in which the clause is to be read, and an examination of evidence regarding the circumstances of its preparation and the purposes intended to be served."[127]

137. The situation changes when the object and purpose used in the scope of the Vienna Convention are transposed to unilateral acts. In the Special Rapporteur's view, there is no place for including this in the context of the interpretation of unilateral acts, since it deals with terms that are specifically applicable to treaty

[125] *I.C.J. Reports 1976*, p. 268, para. 46.
[126] *I.C.J. Reports 1952*, p. 107.
[127] *I.C.J. Reports 1998*, paras. 47 and 49.

relations. In this context, it is important to highlight the intention of the State which formulates the act; hence, the interpretation should be considered "in the light of the intention" of that State, as reflected in draft article (a) set out below.

138. Furthermore, there is the question of the preamble and the annexes, which, despite the difference between the conventional act and the unilateral act, could be considered as belonging to the context for the purposes of interpretation within the scope of unilateral acts.

139. The preamble is the preliminary part of the treaty which precedes its operative provisions and contains an explanatory introduction setting out the reason for the conclusion of the treaty, an indication of the object or purpose of the treaty and perhaps some additional provisions, an indication of the plenipotentiaries who have drafted and signed it, or some of these elements.[128] The preamble, on which little has been written,[129] is, with respect to treaties, "an internal source of reference. The preamble is a principal and natural source from which indications can be gathered of a treaty's objects and purposes even though the preamble does not contain substantive provisions".[130]

140. A unilateral declaration, whether oral or in writing, may contain a preambular part, although it would have some particularities depending on how the act is elaborated, even if there is no reference to this in practice, particularly that examined through the case law. In the *Nuclear Tests* case, we note that the Court examines the declarations of the French authorities, which do not contain a formal preambular part, as can be seen in the communiqué issued by the Government of France in the *Official Journal* of 8 June 1974, as follows:

> "The Office of the President of the Republic takes this opportunity of stating that in view of the stage reached in carrying out the French nuclear defence programme France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed."[131]

Similarly, it will be noted that the President of the Republic issued the following statement to the press on 25 July 1974:

> "on this question of nuclear tests, you know that the Prime Minister had publicly expressed himself in the National Assembly in his speech introducing the Government's programme. He had indicated that French nuclear testing would continue. I had myself made it clear that this round of atmospheric tests would be the last, and so the members of the Government were completely informed of our intentions in this respect".[132]

It is also useful to include the statement made by the Minister for Foreign Affairs of France to the General Assembly of the United Nations on 25 September 1974, which was considered by the Court in this same case, in which he indicated:

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[128] Basdevant, op. cit., p. 465.

[129] See Eric Suy, Le Préamble, in *Mélanges offerts à M. Bedjaoui*, p. 255 and ff.

[130] Dissenting opinion of Judge Weeramantry in the case of the *Arbitral award of 31 July 1989*, quoted in Cahier, op. cit.; *I.C.J. Reports 1991*, p. 142.

[131] *I.C.J. Reports 1974*, p. 265, para. 34.

[132] Ibid., p. 266, para. 37.

> "We have now reached a stage in our nuclear technology that makes it possible for us to continue our programme by underground testing, and we have taken steps to do so as early as next year."[133]

The parts of the declarations that do not specifically describe the action that will be taken, that is, the part in which the obligation is assumed, could be considered their preambular parts for the purposes of interpretation.

141. While it is true that, in such declarations, there is no specific preambular part, the possibility that some part thereof could be considered preambular for the purposes of interpretation should not be ruled out; similarly, the Note accompanying the 1956 Declaration on the Suez Canal, sent by the representative of Egypt to the Secretary-General of the United Nations on 24 April 1957, could be viewed in this light. In this declaration, there is no formal preambular part; however, some of the language in the accompanying Note could be considered preambular, in particular, the statement that:

> "The Government of Egypt is pleased to announce that the Suez Canal is now open for formal traffic and will thus once again serve as a link between the nations of the world in the cause of peace and prosperity."

Furthermore, the content of the next paragraph of the Note could be considered a preambular part of the Declaration. It states:

> "The Government of Egypt wishes to acknowledge with appreciation and gratitude the efforts of the States and peoples of the world who contributed to the restoration of the Canal for normal traffic, and the United Nations whose exertions made it possible that the clearance of the Canal be accomplished peacefully and in a short time."

142. The annexes are also a vital part of a unilateral declaration, although this does not happen frequently, particularly in orally expressed unilateral acts. An example of the inclusion of annexes in unilateral declarations is the case of the joint communiqué signed by the Governments of Venezuela and Mexico, which is a unilateral act from the formal point of view and contains an equally unilateral commitment to the countries of Central America and the Caribbean with regard to the supply of oil, a commitment which has been fulfilled and renewed by both Governments. The act contains an annex specifying the conditions for this. Subsequent practice is equally important in interpretation in general, whether of conventional acts[134] or unilateral acts. Article 31, paragraphs 3 (a) and (b) of the Vienna Conventions establish two types of legal facts subsequent to the conclusion of the treaty: agreements regarding interpretation and subsequent practice which can demonstrate agreement on the meaning of the treaty. The Court has considered subsequent practice, as can be seen in the case of the *terrestrial, island and maritime boundary dispute*.[135]

143. The State may take some sort of action after formulating a unilateral act, which could result in a more exact determination of the content and of the meaning it ascribes to its unilateral declaration. This happened in the case of Venezuela and

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[133] Ibid., para. 39.

[134] Francesco Capotorti, *Sul valore della prassi applicativa dei trattati secondo la convenzione di Vienna*. Published as a tribute to Roberto Ago. Vol. I, p. 197.

[135] *I.C.J. Reports 1992*, pp. 585-586, paras. 378 to 380.

Mexico, which appear to have developed a subsequent practice, the examination of which could help specify or clarify the content and scope of the unilateral commitment assumed by those countries in relation to the Central American countries through a joint communiqué which could be considered a unilateral act of collective origin.

144. An interpretation agreement between the author State of the unilateral act and the addressees regarding interpretation does not seem relevant in a provision of this nature in the context of such acts; it is possible, however, to include in a provision on this question a State's practice after formulating the act.

145. The supplementary means of interpretation established by article 32, which is common to the Vienna Conventions of 1969 and 1986 — the preparatory work and the circumstances of the treaty's conclusion — could be considered only as a subsidiary recourse where it was not possible to establish the parties' intention in interpreting the meaning of the treaty's terms. Indeed, recourse to other means of interpretation could come into play only in a second stage, when the interpreter wishes to confirm the results of the interpretation or his efforts to make a determination on the basis of priority elements has led only to a result which is uncertain or manifestly absurd or unreasonable.[136] There is no doubt as to the importance of the preparatory work despite the criticisms levelled, particularly in relation to the lack of homogeneity, the proliferation which defies all classification and the lack of differentiation which impedes all categorization,[137] which is reflected in international case law, of which there are specific recent examples in, inter alia, the decision of the International Court of Justice in the case of the delimitation of the maritime boundary between Guinea and Guinea-Bissau[138] — although in this case, the parties requested that recourse should be had to the supplementary means laid down in article 32 common to the 1969 and 1986 Vienna Conventions.

146. It should be stressed that resort to preparatory work is not always necessary in order to interpret a text. The Court has stated in this regard that the Permanent Court of International Justice consistently maintained that "there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself",[139] and this was confirmed in the *Ambatielos* case when the Court held that "where ... the text to be interpreted is clear, there is no occasion to resort to preparatory work".[140]

147. In the case of unilateral acts, it is difficult to incorporate resort to preparatory work into a provision for resort to additional means, since in many cases the preparatory work is difficult to locate and therefore to examine, as may be seen in the *Nuclear Tests* and *Territorial Dispute* cases, where neither the Court nor the Chamber make any reference whatsoever to resort to preparatory work. It must be borne in mind, however, that preparatory work may exist and may be made available for purposes of interpretation, even though there is of course no guarantee that it can be made available at any time. Preparatory work in the context of unilateral acts

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[136] Paul Reuter, *Introduction au droit des traités* (op. cit., note 90), para. 145.

[137] Eric Canal-Forgues, Travaux préparatoires. RGDIP. 1993, p. 902.

[138] G. Pambou-Tchivounda, "Le droit international de l'interprétation des traités à l'épreuve de la jurisprudence". *Journal de droit international*, vol. 113, No. 3, 1986, pp. 627-650.

[139] *I.C.J. Reports 1948*, p. 63.

[140] *I.C.J. Reports 1952*, p. 45.

may take the form of the notes and internal memoranda of Ministries of Foreign Affairs or other organs of State, which will not always be easy to obtain and whose value will not be easy to determine. However, in seeking to demonstrate its intention, a State may have recourse to documents which, given the characteristics of the unilateral act, may be likened to the preparatory work to which the Vienna Convention of 1969 refers.

148. International courts have given serious consideration to these documents which, in the context of unilateral acts, may be likened to preparatory work. For example, in its decision in the *Eritrea/Yemen* case, the Arbitral Tribunal notes that "the former interest in these islands of Great Britain, Italy and to a lesser extent of France and the Netherlands, is an important element of the historical materials presented to the Court by the Parties. Not least because they have had access to the archives of the time, specially to early papers of the British Government of the time ... some of these materials are in the form of internal Memoranda." However, the Tribunal minimized the importance of these documents when it stated: "The Tribunal has been mindful that these internal memoranda do not necessarily represent the view of or the policy of any Government and may be no more than the personal view that one civil servant felt moved to express to another particular civil servant at that moment; it is not always easy to disentangle the personality elements from [those] which were, after all, internal, private and confidential memoranda at the time they were made."[141] Even though it may be difficult to obtain such documents, it is possible to consider their importance on a case-by-case basis since, like preparatory work in the context of treaties, they are clearly helpful in interpreting the intention of the State. A reference to preparatory work in this context should therefore be included in the draft article set out below.

149. With regard to the circumstances, the situation is different, as is clear from a review of the Court's decisions in two particular cases that illustrate the importance of the circumstances to interpreting the intention of the author, where an interpretation is not possible on the basis of the meaning itself of the words used in the respective declarations. In the *Nuclear Tests* cases, the Court stated in this regard that "it is from the actual substance of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced".[142] The Court reached a similar conclusion after examining the declaration made by the Head of State of Mali, in the *Territorial Dispute* case, when it stated that "in order to assess the intentions of the author of a unilateral act, account must be taken of all the factual circumstances in which the act occurred ... The circumstances of the present case are radically different. Here, there was nothing to hinder the Parties from manifesting an intention to accept the binding character of the conclusions of the ... Mediation Commission".[143]

150. In the *Border Dispute* case between Mali and Burkina Faso, the Chamber of the Court stated, with reference to the unilateral declaration of the Government of France, that, in the particular circumstances of those cases, that Government "could not express an intention to be bound otherwise than by unilateral declarations. It is difficult to see how it could have accepted the terms of a negotiated solution with

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[141] Award of the Arbitral Tribunal in the first stage of the Proceedings (Territorial Sovereignty and Scope of the Dispute) Eritrea-Yemen, 9 October 1998, paras. 94-95, pp. 25-26.

[142] *I.C.J. Reports 1974*, p. 269, para. 51.

[143] *I.C.J. Reports 1986*, p. 574, para. 40.

each of the applicants without thereby jeopardizing its contention that its conduct was lawful".[144]

151. The reference to the circumstances as an additional means of interpretation, as indicated in article 32 of the Vienna Conventions, may naturally be also applied and incorporated into a provision on the interpretation of unilateral acts.

152. In this connection, the question arises as to whether such rules would be applicable to the two categories of unilateral acts discussed, in other words, all unilateral acts, or whether, on the contrary, specific rules should be elaborated for each category. In this regard, consideration must be given to the fact that upon formulating a unilateral act, whether this is an act by virtue of which it assumes an obligation or an act by which it reaffirms a right or legal claim, the State expresses its intention and manifests its will, which in all cases reflects the same intention and to which the same rules apply for determining its validity or invalidity. Recourse to a review of the legal effects of such acts on the elaboration of different norms therefore appears unnecessary. The rules of interpretation that are elaborated may thus be uniformly applied and placed in the first general part of the draft articles.

B. Draft articles

153. In light of the foregoing, the Special Rapporteur proposes the draft articles (a) and (b) reproduced in the following paragraph. While these articles are based on articles 31 and 32 of the Vienna Convention on the Law of Treaties, they have been adapted to reflect the particular nature of the unilateral act. The reference to "object and purpose", an inherent concept in treaty law that is inapplicable to unilateral acts, has thus been removed from paragraph 1 of article (a). Moreover, doctrine, case law and the views of Governments have all emphasized the "subjective" rather than the "objective" nature of the interpretation of a unilateral act and have shown that the self-imposed restriction on sovereignty implied by the act must be interpreted in its restrictive sense. This was the reason for including the criterion of intention in paragraph 1 by adding the phrase "and in the light of the intention of the author State". Because of this addition to paragraph 1, a paragraph similar to paragraph 4 of article 31 of the Vienna Convention was not included, since this would have been redundant. In article (b), the words "circumstances of its formulation", were replaced, mutatis mutandis, by the words "circumstances of the formulation of the act".

154. The text of the proposed draft articles (a) and (b) therefore reads as follows:

Article (a)
General rule of interpretation

1. A unilateral act shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the declaration in their context and in the light of the intention of the author State.

2. The context for the purpose of the interpretation of a unilateral act shall comprise, in addition to the text, its preamble and annexes.

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[144] *I.C.J. Reports 1986*, idem.

3. There shall be taken into account, together with the context, any subsequent practice followed in the application of the act and any relevant rules of international law applicable in the relations between the author State or States and the addressee State or States.

Article (b)
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work and the circumstances of the formulation of the act, in order to confirm the meaning resulting from the application of article (a), or to determine the meaning when the interpretation according to article (a):

(*a*) Leaves the meaning ambiguous or obscure; or

(*b*) Leads to a result which is manifestly absurd or unreasonable.